

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

GMAC, LLC,

Plaintiff,

v.

HIATT PONTIAC GMC TRUCKS, INC., a  
Delaware corporation, STEPHEN A. HIATT,  
individually, and the marital community  
composed of STEPHEN A. HIATT and  
JANE DOE HIATT; STEPHEN M. HIATT  
and JANE DOE HIATT, husband and wife,  
and THEA HIATT, individually and the  
marital community composed of THEA  
HIATT and JOHN DOE HIATT,<sup>1</sup>

Defendants.

CASE NO. C08-5707RJB

**ORDER ON GMAC'S MOTION  
FOR PARTIAL SUMMARY  
JUDGMENT, DEFENDANTS'  
MOTION TO COMPEL AND  
HIATT INDIVIDUAL  
DEFENDANTS' MOTION FOR  
SUMMARY JUDGMENT AND  
VARIOUS MOTIONS TO  
STRIKE**

This matter comes before the Court on GMAC LLC's ("GMAC") Motion for Partial Summary Judgment (Dkt. 32), Defendants' Motion to Compel and Rule 56(f) Motion to Continue Summary Judgment Response (Dkt. 33), the Hiatt Individual Defendants' Motion for Summary Judgment (Dkt. 24), and the parties various motions to strike (Dkts. 38, 43, 44, and 52). The Court has considered the pleadings filed in support of and in opposition to the motions

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<sup>1</sup>Parties may wish to amend the caption to reflect this Order.

1 and the file herein.

2 **I. FACTUAL AND PROCEDURAL BACKGROUND**

3 **A. FACTS**

4 Hiatt Pontiac GMC Trucks, Inc. ("Hiatt Pontiac") was incorporated on March 22, 1985.  
5 Dkt. 26-2, at 7-18. Hiatt Pontiac created by-laws (Dkt.26-2, at 19-34) and issued stock to its  
6 initial shareholders, Stephen A. Hiatt and General Motors, through Motors Holding Division  
7 ("MHD"), (Dkts. 26-2, at 35-38 and 26-3, at 2-3, 39). In exchange for a start up loan, MHD  
8 owned 75% of the stock and Stephen A. Hiatt owned 25% of the stock. Dkt. 26-2, at 35-38; Dkt.  
9 26-3, at 2-3, and Dkt. 25, at 3. Hiatt Pontiac had corporate directors and officers, (Dkt. 26-2, at  
10 39-40), held shareholders and board of directors meetings (Dkt. 26-4, at 2-19), made corporate  
11 resolutions (Dkt. 26-4, at 21-32), and submitted state and federal filings (Dkt. 26-5, at 2-23).  
12 Hiatt Pontiac filed corporate income tax returns, had bank accounts, kept financial and personnel  
13 records, and entered into contracts through its officers. Dkt. 25, at 3.

14 As a stockholder, MHD had access to Hiatt Pontiac's corporate records. Dkt. 26-2, at 33.  
15 MHD had business practices, policies and procedures that Hiatt Pontiac had to agree to follow.  
16 Dkt. 25, at 3. In 1989, Stephen A. Hiatt bought all MHD's stock and paid off the start up loan.  
17 Dkts. 25, at 3- 5, and 26-3, at 71. Hiatt Pontiac continued to follow most of MHD's established  
18 procedures. Dkt. 25, at 3. Pursuant to MHD requirements, Hiatt Pontiac set up accounts for  
19 employee receivables, referred to as "220 accounts." Dkt. 25, at 3. The appropriate 220 account  
20 was debited for "any personal expenses or payments advanced by Hiatt Pontiac and the sums  
21 would either be deducted from the employee's paycheck or repaid by the employee." Dkt. 25, at  
22 3.

23 1. *"Floor Plan Financing" with GMAC*

24 In the operation of the dealership, Hiatt Pontiac entered into a financing agreement with  
25 GMAC as required by MHD. Dkt. 29-13, at 7; Dkt. 25, at 4. Referred to as "floor plan  
26 financing," this arrangement was memorialized by the "Wholesale Security Agreement"  
27 ("WSA"), and was signed on April 23, 1985, by Stephen A. Hiatt, as President of Hiatt Pontiac,  
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1 and a GMAC representative. Dkts. 29-2, at 2; 29-13, at 9. As a new dealer, GMAC additionally  
2 required that Stephen A. Hiatt sign a personal guarantee for the flooring line. Dkt. 25, at 5.  
3 GMAC provided floor plan financing for Hiatt Pontiac from 1985 until August of 2008. Dkt.  
4 29-13, at 9. Under this plan, GMAC would pay GM, American Suzuki, Isuzu Commercial  
5 Truck, Nissan Diesel, Hino Motor Sales and other manufacturers for new vehicles on behalf of  
6 Hiatt Pontiac, and Hiatt Pontiac would repay GMAC when the new vehicles were sold. Dkt. 29-  
7 13, at 10-11. Hiatt Pontiac also made a monthly interest payment to GMAC. Dkt. 29-13, at 11.  
8 GMAC eventually provided financing for some, but not all, of Hiatt Pontiac's used cars as well.  
9 Dkt. 25, at 16. The parties do not dispute that GMAC had a secured interest in the cars for  
10 which it provided financing.

11 Robert Halcovich, one of GMAC's Portfolio Managers, states that based on his review of  
12 GMAC's account records for Hiatt Pontiac, and "based upon [his] understanding of GMAC's  
13 typical business practices with respect to dealer-borrowers like Hiatt Pontiac . . . Hiatt Pontiac  
14 had repayment obligations for each vehicle it sold that was financed by GMAC." Dkt. 30, at 3.  
15 According to Mr. Halcovich, GMAC required Hiatt Pontiac to pay unpaid balances of any loan  
16 with respect to a financed vehicle no later than: "(1) the first business day after receipt by Hiatt  
17 Pontiac of a payment for such vehicle or (2) the third business day after delivery by Hiatt Pontiac  
18 of a vehicle to a purchaser, whichever comes first." Dkt. 30, at 3. "If a vehicle is sold, and the  
19 outstanding balance is not paid off as required, the unit is referred to as being 'sold out of trust'  
20 or 'SOT.'" Dkt. 30, at 3.

21 According to Melissa Branham, Hiatt Pontiac's controller, the dealership usually paid off  
22 GMAC after Hiatt Pontiac was "funded" by the customer that purchased the vehicle. Dkt. 29-14,  
23 at 4. Ms. Branham stated that the typical time frame for the "funding source" to pay Hiatt  
24 Pontiac was three to five days. Dkt. 29-14, at 5. She states that they would then pay GMAC  
25 "promptly" after that if they had the cash on hand. Dkt. 29-14, at 5. She was aware of GMAC's  
26 requirement that they be paid within three business days of a vehicle being sold. Dkt. 29-14, at  
27 9. Ms. Branham states that there were instances when GMAC was not paid within three business  
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1 days of the unit being sold for various reasons. Dkt. 29-14, at 12. She states that, for example,  
2 sometimes vehicles would be placed upon a “delayed payment plan,” when a customer’s funding  
3 was delayed. Dkt. 29-14, at 12.

4 Dean Carpenter, who was the General Manager at Hiatt Pontiac until February of 2008,  
5 states that he was also involved in the decision of when Hiatt Pontiac paid GMAC for vehicles.  
6 Dkt. 29-15, at 4. He stated that if Hiatt Pontiac’s reports showed that “flooring was due” on a  
7 particular unit, he would confirm that the vehicle had actually “physically rolled,” and then  
8 determine when they expected to be “funded.” Dkt. 29-15, at 5. He states that he would then  
9 check and see if there was enough cash in the Hiatt Pontiac accounts, and then payoff GMAC.  
10 *Id.* He states that if there was not enough cash to pay GMAC, then they would not pay the  
11 vehicle off that day. *Id.* Mr. Carpenter acknowledges that they tried to pay GMAC off in around  
12 three days, but there were times when they had to “drag their feet.” *Id.*, at 6.

## 13 2. Credit Cards

14 There were credit cards in the name of Hiatt Pontiac, for which several people made  
15 charges including, Stephen A. Hiatt, Carol Hiatt (Stephen A. Hiatt’s wife), Stephen M. Hiatt  
16 (Stephen A. Hiatt’s son), Dean Carpenter, and Mark Unsell. Dkt. 25, at 4, and Dkt. 46-17.  
17 Stephen A. Hiatt acknowledges that they often charged, to Hiatt Pontiac, meals for business  
18 meetings, hotels and plane tickets for conferences, tickets for sporting events and other  
19 entertainment to which they took customers. Dkt. 51, at 18-22. Stephen M. Hiatt states that, as  
20 an employee of Hiatt Pontiac, he would often take sales associates and other Hiatt Pontiac  
21 employees out for lunches to discuss business and would pay with the Hiatt Pontiac credit cards.  
22 Dkt. 51, at 35-36. He states that he would charge items at Costco for office barbeques, and  
23 various things at Home Depot for the dealership. *Id.* Stephen A. Hiatt acknowledges that he  
24 also had personal credit cards. Dkt. 25, at 4. He states that to the extent he or his wife charged  
25 personal items on the Hiatt Pontiac cards, the charges were tracked on his 220 account, and  
26 repaid, as they were for other employees. Dkt. 25, at 16. Hiatt Pontiac’s controller, Melissa  
27 Branham, states that personal charges by the Hiatts on the company cards were rare, and  
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1 confirms that she would charge them to Mr. Hiatt's 220 account. Dkt. 51, at 44. Stephen A.  
2 Hiatt asserts that GMAC received copies of the financial reports which included the 220  
3 accounts. Dkt. 25, at 4.

4 3. *Loans from the Hiatts to Hiatt Pontiac*

5 According to Stephen A. Hiatt, "[d]uring the recession of the 1990's Hiatt Pontiac needed  
6 additional working capital and funds to floor it's used vehicles." Dkt. 25, at 5. GMAC  
7 requested and received a personal guarantee from Stephen A. Hiatt and additional security  
8 agreements for additional collateral. *Id.* GMAC released the personal guarantee and additional  
9 collateral in 1998 after Stephen A. Hiatt personally invested \$500,000 and Hiatt Pontiac returned  
10 to profitability. *Id.*

11 In the mid 2000's Hiatt Pontiac experienced declining profits, which became serious  
12 losses in 2007. Dkt. 25, at 5. Hiatt Pontiac attempted to diversify and added a Suzuki franchise.  
13 *Id.* GMAC provided the \$1.5 million to floor the Suzuki line. *Id.* In June of 2005, Stephen A.  
14 Hiatt and Carol M. Hiatt loaned Hiatt Pontiac \$500,000. *Id.* This loan was memorialized by a  
15 promissory note, and was approved by the board. *Id.* The loan was to be repaid in 106 monthly  
16 payments, the last payment was to be due in February 2014. Dkt. 46-7, at 2. Stephen A. Hiatt  
17 does not dispute that on August 15, 2008, he authorized a payoff of the full loan amount. Dkt.  
18 46-13, at 37-38. GMAC asserts that the Hiatt Pontiac's general ledger shows that \$355,571 was  
19 used to repay this loan. Dkt. 46-9, at 4.

20 In May of 2008, Hiatt Pontiac had to lay numerous employees off. Dkt. 25, at 7. It was  
21 struggling to pay the interest on the GMAC flooring plan, and high fuel costs, and to deal with  
22 the significant market downturn. Dkt. 25, at 9. Stephen A. Hiatt loaned the dealership another  
23 \$100,000 at that time to try to ensure a sufficient cash flow. Dkt. 25, at 5. On August 11, 2008,  
24 the May 2008 loan was noted as a credit on his 220 account. Dkt. 25, at 5; Dkt. 46-8, at 4.

25 4. *Discussions Regarding Sale of the Dealership to GM*

26 Stephen A. Hiatt states that in late May of 2008, he met with Jim Gentry, a GM regional  
27 manager. Dkt. 25, at 7. Mr. Hiatt states that they discussed his selling Hiatt Pontiac business for  
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1 around three million dollars. *Id.* Mr. Hiatt felt that GM wanted him to sell his Pontiac GMC  
2 dealership so it could combine those brands with a Buick dealer in the Tacoma area. *Id.* Mr.  
3 Hiatt states that he signed a proposal and Mr. Gentry took it to GM in Detroit. *Id.*, at 8.

4 Mr. Hiatt alleges that in late July 2008, he called Mr. Gentry and was told that only one  
5 million was available. *Id.* After discussing price, Mr. Hiatt states that he was told that final  
6 approval was to be given on August 22, 2008. *Id.* Mr. Hiatt states that “looking toward the  
7 likely sale of the business, [he] authorized Hiatt Pontiac to repay the balance of the June 2005  
8 promissory note to [his wife and him] on August 15, 2008, so that the underlying deed of trust on  
9 [their] real property would be released to permit [them] to recapitalize Hiatt Pontiac.” *Id.* He  
10 asserts that, “at that time GMAC’s proposals included Stephen A. Hiatt personally granting a  
11 deed of trust on the property used to secure this note.” *Id.*

12 Mr. Hiatt states that just prior to August 14, 2008, GMAC informed Hiatt Pontiac that it  
13 was not going to provide any more financing requests for used vehicles. Dkt. 39, at 2.

14 5. *GMAC’s August 14, 2008, Audit*

15 GMAC had the right to perform what the parties refer to as “flooring plan audits.” Dkt.  
16 25, at 11. A “floor plan audit” allowed GMAC to verify that their collateral was still at the  
17 dealership and had not been sold. Dkt. 29-13, at 16. GMAC would typically check the vehicle  
18 identification number (“VIN”) on each unit and compare that to their floor plan billing  
19 statement. Dkt. 29-13, at 16.

20 On August 14, 2008, GMAC performed a flooring plan audit at Hiatt Pontiac. Dkt. 25, at  
21 11. Vehicle titles were separated into two stacks: 1) vehicles floored by GMAC and 2) those not  
22 floored by GMAC. *Id.* Stephen A. Hiatt states that he informed Don Rice, of GMAC, that there  
23 would be more than usual sold and unpaid units than in the past. Dkt. 25, at 11. Mr. Hiatt states  
24 that Mr. Rice demanded that he sign personal guarantees, an additional security agreement and  
25 assignments of account or GMAC would repossess their inventory. *Id.* Mr. Hiatt refused. *Id.*  
26 Due to the stress of the situation making his heart condition worse, Stephen A. Hiatt’s son,  
27 Stephen M. Hiatt, became the dealership’s direct contact with GMAC. Dkt. 25, at 11-13.

1 At the conclusion of GMAC's August 2008 audit, GMAC discovered that Hiatt Pontiac  
2 had sold 64 vehicles for which Hiatt Pontiac had not paid GMAC. Dkt. 30, at 4. The principal  
3 amount of the unpaid debt for these 64 sold vehicles was \$1,247,838.81. Dkt. 30, at 5. Robert  
4 Halcovich, of GMAC, states that "based upon his review of GMAC's account records for Hiatt  
5 Pontiac, and based on [his] understanding of GMAC's typical business practices with respect to  
6 dealer-borrowers like Hiatt Pontiac, . . . at the conclusion of the [August 2008 audit] GMAC  
7 made demand for payment." Dkt. 45, at 3-4.

8 Stephen A. Hiatt states that the August 2008 audit was very different than other audits  
9 GMAC had done in the past. Dkt. 39, at 2. He states that in the past GMAC would provide  
10 them a detailed accounting and they would pay GMAC or "conduct follow-up negotiations." *Id.*  
11 Moreover, he asserts that in years past, often there was a disparity between the number of  
12 vehicles missing from the lot and those for which they had collected payment. Dkt. 39, at 2. He  
13 asserts that on other occasions, GMAC would allow them time to "regain possession of a handful  
14 of vehicles (referred to in the trade as 'unwind' the deal), and count the vehicle for which no  
15 payment had been received as part of the inventory." Dkt. 39, at 2-3. He states that GMAC did  
16 not give them any time to respond, like they had in the past. *Id.* He asserts that on this occasion,  
17 GMAC sent more auditors than usual, and the auditors took down the serial numbers of "every  
18 single car on the lot, including cars belonging to customers and cars taken on consignment." *Id.*,  
19 at 3. Mr. Hiatt asserts that GMAC then used this inflated number in its pleadings to the Pierce  
20 County Washington Superior Court to get a Temporary Restraining Order ("TRO"), which is  
21 discussed in greater detail below. *Id.*

22 According to Stephen A. Hiatt, GMAC never attempted to reconcile non-floored vehicles  
23 in prior audits. *Id.* He states that they began to separate the non-floored vehicles from the ones  
24 GMAC floored. Dkt. 25, at 13. Stephen M. Hiatt states that, at his father's request, they  
25 eventually moved the some of the vehicles that GMAC did not finance away from the dealership.  
26 Dkt. 46-13, at 67. Stephen A. Hiatt states that his focus was "to keep the dealership operational  
27 without flooring and be able to sell some or all of [their] franchises." Dkt. 25, at 13. He states  
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1 that under his dealership agreements and Washington law, manufacturers could terminate him if  
2 he is closed for seven consecutive days without paying any reimbursement. *Id.*

3 6. *Post Audit Events*

4 On August 18, 2008, GM froze Hiatt Pontiac's "open account." Dkt. 39, at 5. The "open  
5 account is a clearing account through which all funds due either to GM or Hiatt Pontiac flow."  
6 Dkt. 39, at 5. Stephen A. Hiatt asserts that rather than pay Hiatt Pontiac funds GM owed it, "the  
7 funds were diverted for the benefit of GMAC." Dkt. 39, at 5.

8 Hiatt Pontiac surrendered possession of the vehicles financed by GMAC beginning on  
9 August 19, 2008. Dkt. 45, at 5. As of the end of August 2008, Hiatt Pontiac owed GMAC a  
10 total of \$11,835,628.69 in principal for new and used vehicles. Dkt. 29-4, at 2.

11 According to Stephen A. Hiatt, on August 22, 2008, the same day the final approval was  
12 to be given for the sale of the dealership, GM reduced the offer to \$200,000 and set a deadline of  
13 noon on August 28, 2008, for Hiatt Pontiac's acceptance. Dkt. 25, at 8. Stephen A. Hiatt states  
14 that "the offer included complete releases for GM and its affiliates, which included GMAC."  
15 Dkt. 25, at 8. Mr. Hiatt states that he made a counteroffer of one million, which included  
16 releases for all parties, and an assignment of one million to GMAC to cover the sold and unpaid  
17 units. *Id.*, at 8-9. GM did not accept.

18 GMAC asserts that on August 28, 2008, \$231,031.97 was withdrawn from the  
19 dealership's operating account in the form of cashier's checks. Dkt. 46-11, at 5. Stephen A.  
20 Hiatt acknowledges that he approved many payments that day including payroll, payroll taxes,  
21 insurance, credit cards, gas, rent owed himself, and the following payments:

- 22 • \$35,064.58 to himself, representing three months salary in advance in order to wind  
23 down the business;
- 24 • \$30,000 to Stephen M. Hiatt, representing three months salary in advance;
- 25 • \$21,000 to Melissa A. Branham, Hiatt Pontiac's Controller, representing three months  
26 salary in advance;
- 27 • \$15,000 to Tami Hiatt, representing salary to help wind down the business;



1 • \$63,485.77 to Pierce County representing one year of real estate taxes paid in advance;  
2 Dkt. 26-6, at 13-14; Dkt. 51, at 42.

3 In the afternoon of August 28, 2008, at the urging of GM and GMAC, the Pierce County,  
4 Washington Superior Court entered a TRO, referenced above, against Hiatt Pontiac. Dkt. 31-2,  
5 at 3. The TRO provides that “[p]ursuant to a Wholesale Security Agreement, and amendments  
6 thereto, [Hiatt Pontiac] granted to GMAC a security agreement in new and used motor vehicle  
7 inventory, and proceeds thereof.” Dkt. 31-2, at 4. The TRO prohibits Hiatt Pontiac, in relevant  
8 part, from making any “additional sales, transfers, or distributions of any of its new or used  
9 motor vehicle inventory,” and “without GMAC’s express written consent, making any transfer,  
10 withdrawal, or distribution” from Hiatt Pontiac’s general operating bank account. *Id.*, at 5-6. On  
11 September 10, 2008, an Order for Preliminary Injunction, with similar provisions, was entered in  
12 Pierce County Washington Superior Court. Dkt. 31-3, at 3.

13 According to Stephen A. Hiatt, he made and approved the payments before entry of the  
14 TRO and before he was even served a copy of it. Dkt. 25, at 17. He states that there are  
15 numerous unpaid creditors, in addition to GMAC. Dkt. 25, at 18. He also states that GMAC did  
16 not make a demand for payment for non-floored vehicles before they obtained the TRO on  
17 August 28, 2008. Dkt. 25, at 17. He states that the county returned \$33,890.51, representing  
18 property taxes for January 1-June 30, 2009, because it was early, and those funds were used for  
19 other business expenses. Dkt. 53, at 3.

20 In September of 2008, Hiatt Pontiac and GMAC entered into an “Agreement Regarding  
21 Disposition of Collateral.” Dkt. 46-12, at 2. GMAC states that it sold the vehicles it repossessed  
22 back to the manufacturers when it could, at private dealer auctions, online through  
23 “SmartAuction,” and directly to third parties. Dkt. 45, at 6-7. GMAC asserts that after  
24 disposing of the collateral, there is still a total deficiency of \$3,859,037.42 owed by Hiatt Pontiac  
25 on the amount financed by GMAC. Dkt. 45, at 7. GMAC asserts that Hiatt Pontiac also owes it  
26 \$345,252.03 in interest and \$111,649.71 for costs incurred in connection with the disposition of  
27 the collateral. *Id.* GM terminated Hiatt Pontiac GMC’s dealership contract effective October 13,  
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2008, and awarded Gilchrist Buick its Pontiac GMC business on October 31, 2008. Dkt. 24, at 14.

Defendant Thea Hiatt, Steven M. Hiatt's wife, was never an employee, shareholder, director or corporate officer of Hiatt Pontiac. Dkt. 25, at 18. According to Stephen A. Hiatt she received no funds from Hiatt Pontiac in 2008. *Id.*

## **B. PROCEDURAL HISTORY**

On October 9, 2008, GMAC filed this suit in Pierce County Washington Superior Court, making claims for: (1) breach of the Wholesale Security Agreement against Hiatt Pontiac, (2) possession of personal property against Hiatt Pontiac, (3) injunctive relief against Hiatt Pontiac, (4) breach of fiduciary duty against Stephen A. Hiatt, (5) tortious interference with a contractual relationship against Stephen A. Hiatt and Stephen M. Hiatt, (6) fraudulent transfer against all Defendants, (7) conspiracy against all Defendants, (8) petition to compel Hiatt Pontiac to collect unlawful distributions, and (9) impose constructive trust against all Defendants. Dkt. 1-4, at 5-19. The case was removed on November 24, 2008. Dkt. 1.

Defendants filed an Answer and make counterclaims for: (1) violation of § 1 of the Sherman Act, 15 U.S.C. § 1, (2) violation of the Washington State Consumer Protection Act ("WCPA"), RCW 19.86.020, (3) violation of the covenant of good faith and fair dealing, and (4) breach of contract. Dkt. 5.

Trial is set for January 25, 2010. Dkt. 18.

## **C. PENDING MOTIONS**

GMAC moves for summary judgment on its claims against Hiatt Pontiac for breach of contract and claims against Stephen A. Hiatt for breach of fiduciary duty and fraudulent transfer. Dkt. 32. GMAC moves for summary dismissal of Hiatt Pontiac's counterclaims of violation of the WCPA, violation of the covenant of good faith and fair dealing, and breach of contract. *Id.*

In addition to filing a response to GMAC's Motion for Partial Summary Judgment, Defendants filed a motion to compel and motion pursuant to Fed. R. Civ. P. 56 (f) regarding GMAC's Motion for Partial Summary Judgment. Dkts. 33 and 35. Specifically, Defendants

1 seek an order compelling GMAC to answer Interrogatory No. 24 and Request for Production No.  
2 28. *Id.* They assert that this discovery will help them respond to the motion for summary  
3 dismissal of their WCPA claim. *Id.* Defendants argue that “the heart of this litigation involves  
4 the collusion between GMAC and its affiliate GM to force Hiatt Pontiac out of business, thereby  
5 achieving GM’s long term goal of channeling all of the Buick, Pontiac and GMC brands in  
6 Tacoma into one dealer: Gilchrist.” *Id.*, at 2.

7 The individual Defendants Stephen A. Hiatt, Carol M. Hiatt, Stephen M. Hiatt, and Thea  
8 Hiatt (“Hiatt Individuals”) move for summary dismissal of GMAC claims to the extent that  
9 GMAC seeks: “1) to pierce the corporate veil and hold Stephen A. Hiatt personally liable for all  
10 obligations of Hiatt Pontiac to GMAC;” 2) to hold that Stephen A. Hiatt breached his fiduciary  
11 duty; 3) to hold the Hiatts individually liable for payments they received on August 28, 2008;  
12 and “4) any attempt to recover based upon some alleged ‘conspiracy’ among the Hiatt  
13 individuals.” Dkt. 24, at 3.

#### 14 **D. ORGANIZATION OF THE OPINION**

15 This opinion will first address the various motions to strike (Dkts. 38, 43, 44 and 52),  
16 then address Defendants’ Motion Pursuant to Fed. R. Civ. P. 56(f) and Motion to Compel (Dkt.  
17 33), then GMAC’s Motion for Partial Summary Judgment (Dkt. 32), and lastly the Hiatt  
18 Individual Defendants’ Motion for Summary Judgment (Dkt. 24).

### 19 **II. DISCUSSION**

#### 20 **A. MOTIONS TO STRIKE**

21 Western District of Washington Civil Rule of Procedure 7 (e)(2) provides that response  
22 briefs to motions for summary judgments are not to exceed twenty-four pages, and reply briefs  
23 are not to exceed twelve pages. Local Rule 7(g) requires that “requests to strike material  
24 contained in or attached to submissions of opposing parties shall not be presented in a separate  
25 motion to strike, but shall instead be included in the responsive brief.” The Rule further provides  
26 that requests to strike materials contained in or attached to a reply should be done via a surreply,  
27 and in accord with the Local Rules.

1                   1.       Defendants' Motion to Strike

2                   In their response to GMAC's Partial Motion for Summary Judgment, Defendants move to  
3 strike the Declaration of Robert Halcovich. Dkt. 38. Defendants argue that his declaration  
4 should be stricken because it was not signed and because it contains opinions without a factual  
5 basis. *Id.* Defendants' motion to strike the Declaration of Halcovich (Dkt. 38) should be granted  
6 to the extent that it contains testimony without a factual basis, and denied in all other respects.  
7 Mr. Halcovich supplemented his Declaration with a signature page. Dkt. 45. To the extent that  
8 his Declaration contains testimony without a factual basis it was not considered.

9                   2.       GMAC's Motions to Strike

10                  GMAC files three separate pleadings entitled "GMAC LLC's Objections to Stephanie  
11 Bloomfield's Declaration in Support of Individual Defendants' Motion for Summary Judgment"  
12 (Dkt. 44), "GMAC LLC's Objections to Stephen A. Hiatt's Declaration in Support of Individual  
13 Defendants' Motion for Summary Judgment" (Dkt. 43), and "GMAC LLC's Objections to the  
14 Supplemental Declaration of Stephen A. Hiatt" (Dkt. 52). These motions appear to be motions  
15 to strike.

16                  GMAC failed to follow the Local Rules regarding motions to strike and has met or  
17 exceeded the page limits for its responses and replies to the motions for summary judgment. In  
18 the interests of reaching the merits of this case, however, the Court will, nevertheless, consider  
19 GMAC's motions to strike.

20                  "GMAC LLC's Objections to Stephanie Bloomfield's Declaration in Support of  
21 Individual Defendants' Motion for Summary Judgment" (Dkt. 44), construed as a motion to  
22 strike, should be denied. Ms. Bloomfield is counsel for the Defendants, and GMAC objects to  
23 her declaration in that it attaches several documents, of which she is not the personal custodian.  
24 In response, Mr. Hiatt files a pleading stating that he is the custodian of Hiatt Pontiac records  
25 and that all the record attached to Ms. Bloomfield's Declaration are authenticated. Dkt. 53.

26                  "GMAC LLC's Objections to Stephen A. Hiatt's Declaration in Support of Individual  
27 Defendants' Motion for Summary Judgment" (Dkt. 43), construed as a motion to strike, should  
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1 be granted, in part, and denied in all other respects. To the extent that the Declaration contained  
2 statements for which Stephen A. Hiatt had no personal knowledge, it was not considered. To the  
3 extent that it contained material that was not relevant, those statements were not considered.

4 “GMAC LLC’s Objections to the Supplemental Declaration of Stephen A. Hiatt” (Dkt.  
5 52) should be granted to the extent that the Declaration contains unauthenticated documents.  
6 GMAC’s motion should be denied in all other respects.

#### 7 **B. SUMMARY JUDGMENT - STANDARD**

8 Summary judgment is proper only if the pleadings, depositions, answers to  
9 interrogatories, and admissions on file, together with the affidavits, if any, show that there is no  
10 genuine issue as to any material fact and the moving party is entitled to judgment as a matter of  
11 law. Fed. R. Civ. P. 56(c). The moving party is entitled to judgment as a matter of law when the  
12 nonmoving party fails to make a sufficient showing on an essential element of a claim in the case  
13 on which the nonmoving party has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317,  
14 323 (1985). There is no genuine issue of fact for trial where the record, taken as a whole, could  
15 not lead a rational trier of fact to find for the non moving party. *Matsushita Elec. Indus. Co. v.*  
16 *Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (nonmoving party must present specific,  
17 significant probative evidence, not simply “some metaphysical doubt.”); *See also* Fed. R. Civ. P.  
18 56(e). Conversely, a genuine dispute over a material fact exists if there is sufficient evidence  
19 supporting the claimed factual dispute, requiring a judge or jury to resolve the differing versions  
20 of the truth. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 253 (1986); *T.W. Elec. Serv., Inc. v.*  
21 *Pac. Elec. Contractors Ass’n*, 809 F.2d 626, 630 (9th Cir. 1987).

22 The determination of the existence of a material fact is often a close question. The court  
23 must consider the substantive evidentiary burden that the nonmoving party must meet at trial –  
24 e.g., a preponderance of the evidence in most civil cases. *Anderson*, 477 U.S. at 254; *T.W. Elec.*  
25 *Serv., Inc.*, 809 F.2d at 630. The court must resolve any factual issues of controversy in favor of  
26 the nonmoving party only when the facts specifically attested by that party contradict facts  
27 specifically attested by the moving party. The nonmoving party may not merely state that it will  
28

1 discredit the moving party's evidence at trial, in the hopes that evidence can be developed at trial  
 2 to support the claim. *T.W. Elec. Serv., Inc.*, 809 F.2d at 630 (relying on *Anderson, supra*).  
 3 Conclusory, non specific statements in affidavits are not sufficient, and missing facts will not be  
 4 presumed. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888-89 (1990).

5 **C. DEFENDANTS' FED. R. CIV. P. 56 (f) MOTION AND MOTION TO**  
 6 **COMPEL**

7 Fed. R. Civ. P. 56(f) provides:

8 If a party opposing the motion shows by affidavit that, for specified reasons, it  
 9 cannot present facts essential to justify its opposition, the court may: (1) deny the  
 motion; (2) order a continuance to enable affidavits to be obtained, depositions to  
 be taken, or other discovery to be undertaken; or (3) issue any other just order.

10 To prevail under this Rule, parties opposing a motion for summary judgment must make "(a) a  
 11 timely application which (b) specifically identifies (c) relevant information, (d) where there is  
 12 some basis for believing that the information sought actually exists." *Blough v. Holland Realty*  
 13 *Inc.*, 574 F.3d 1084, 1091(9th Cir. 2009)(citing *Employers Teamsters Local Nos. 175 and 505*  
 14 *Pension Trust Fund v. Clorox Co.*, 353 F.3d 1125, 1129-30 (9th Cir.2004)). The burden is on  
 15 the party seeking additional discovery to proffer sufficient facts to show that the evidence sought  
 16 exists, and that the additional evidence would prevent summary judgment. *Id.* (citing *Chance v.*  
 17 *Pac-Tel Teletrac Inc.*, 242 F.3d 1151, 1161 n. 6 (9th Cir.2001)).

18 GMAC moves, in part, for summary dismissal of Hiatt Pontiac's WCPA claim against it.  
 19 Dkt. 32. Defendants make a motion under Fed. R. Civ. P. 56 (f). Dkts. 33 and 35. Defendants  
 20 allege that their WCPA claim parallels their Sherman Act claim, and point out that GMAC does  
 21 not move for dismissal of the federal antitrust claim. Dkt. 38, at 24-25. Defendants further seek  
 22 an order compelling GMAC to answer Interrogatory No. 24 and Request for Production No. 28.  
 23 Dkts. 33 and 35. Interrogatory No. 24 and Request for Production No. 28 seek information  
 24 about GMAC's internal communications regarding Hiatt Pontiac for 2006-2008. Dkt. 34, at 37.  
 25 Defendants argue that "the heart of this litigation involves the collusion between GMAC and its  
 26 affiliate GM to force Hiatt Pontiac out of business, thereby achieving GM's long term goal of  
 27 channeling all of the Buick, Pontiac and GMC brands in Tacoma into one dealer: Gilchrist."

1 Dkt. 35, at 2.

2 Typically, “[t]o state a prima facie claim under the WCPA, a plaintiff must establish five  
3 distinct elements: (1) unfair or deceptive act or practice; (2) occurring in trade or commerce; (3)  
4 public interest impact; (4) injury to plaintiff in his or her business or property; (5) causation.”  
5 *Ambach v. French*, 216 P.3d 405, 407 (2009)(*internal citations omitted*). The WCPA has been  
6 held to be coextensive with the Sherman Antitrust Act (15 U.S.C.), and courts look to federal  
7 law for guidance in deciding cases in this area. *See State v. Black*, 100 Wn.2d 793, 799-800  
8 (1984). To establish a claim for attempted monopolization in violation of WCPA and its federal  
9 equivalent, 15 U.S.C. § 2, the claimant must prove: “(1) specific intent to control prices or  
10 destroy competition, (2) predatory or anticompetitive conduct to accomplish the monopolization,  
11 (3) a dangerous probability of success, and (4) causal antitrust injury.” *Forsyth v. Humana, Inc.*,  
12 114 F.3d 1467, 1477 (9th Cir.1997).

13 Defendants argue that their WCPA claim, which is coextensive with their Sherman Act  
14 claim, is based on the following facts:

15 GMAC instituted audit proceedings and conducted them in a manner inconsistent  
16 with prior audits which were calculated to make resolution of any issues raised by  
17 the audit impossible, allowing GMAC to seize the inventory and assets of the  
18 Hiatt Pontiac GMAC dealership for the purpose and effect of achieving GM’s  
channeling goals, destroying the business of Hiatt Pontiac GMAC, and  
minimizing or eliminating competition for the sale of GM products in the Pierce  
County area.

19 Dkt. 38, at 25. GMAC does not address any of the elements of the Sherman Act claim.

20 Defendants’ motion pursuant to Fed. R. Civ. P. 56 (f) (Dkts. 33 and 35) should be granted  
21 as to GMAC’s motion to summarily dismiss Defendants’ WCPA claim, and denied as to the  
22 remaining issues raised in GMAC’s motion. Defendants sufficiently identify relevant  
23 information and show that there is some basis for believing that the information sought actually  
24 exists. GMAC’s motion for summary dismissal of Defendants’ WCPA claim (Dkt. 32) should  
25 be denied without prejudice.

26 Further, Defendants’ Motion to Compel (Dkts. 33 and 35) should be granted and GMAC  
27 should be compelled to answer Interrogatory No. 24 and Request for Production No. 28 to the  
28



1 extent that it has not already done so. Although the Court acknowledges that this motion did not  
2 follow the deadline in the scheduling order, in the interest of fully and fairly reaching the merits  
3 of this case, these discovery requests should be more fully answered. Further, parties are  
4 strongly encouraged to resolve discovery issues, if possible, without court intervention.

5 **D. GMAC'S MOTION FOR SUMMARY JUDGEMENT**

6 As a federal court sitting in diversity, this court is bound to apply state law. *State Farm*  
7 *Fire and Casualty Co. v. Smith*, 907 F.2d 900, 901 (9th Cir. 1990). This section (II. D.) of the  
8 opinion will be organized according to claim. GMAC moves for summary judgment on its  
9 breach of contract claim, breach of fiduciary duty claim, and fraudulent transfer claim. Dkt. 32.  
10 It also moves for summary dismissal of Defendants' WCPA, breach of contract, and breach of  
11 the covenant of good faith and fair dealing claims. *Id.*

12 1. GMAC's Breach of Contract Claim Against Hiatt Pontiac

13 The elements of a breach of contract claim in Washington are: 1) the existence of a valid  
14 contract between the parties, 2) breach by the defendant, and 3) damages. *See Hearst*  
15 *Communications, Inc. v. Seattle Times Co.*, 154 Wash.2d 493 (2005). Parties do not contest that  
16 the WSA constituted a valid contract between the parties. The parties do contest whether Hiatt  
17 Pontiac breached the WSA. Dkts. 32 and 38.

18 The WSA provided that Hiatt Pontiac agreed "upon demand to pay to GMAC the amount  
19 it advances or is obligated to advance to the manufacturer or distributor for each vehicle with  
20 interest." Dkt. 29-2, at 2. Further, Hiatt Pontiac agreed that "as each vehicle is sold, or leased,  
21 [they] will faithfully and promptly remit to [GMAC] the amount [GMAC] advanced." *Id.*

22 Review of a contract is generally limited to the contract itself, and parol evidence or  
23 extrinsic evidence is not admissible to add to, subtract from, vary, or contradict written contracts  
24 that are valid, complete, unambiguous, and not affected by accident, fraud, or mistake. *Berg v.*  
25 *Hudesman*, 115 Wn.2d 657, 670 (1990). The WSA contains an ambiguous term: "promptly" in  
26 relation to when payment was due to GMAC. Whether Hiatt Pontiac breached the WSA turns on  
27 the interpretation of this term. In the state of Washington, contract interpretation requires the  
28



1 court to determine the meaning of a contract term and the parties' intentions. *Berg v. Hudesman*,  
2 115 Wn.2d 657, 663 (1990). Washington state has adopted the "context rule" and recognized  
3 that intent of the contracting parties regarding particular terms cannot be interpreted without  
4 examining the context surrounding an instrument's execution. *Hearst* at 502. Accordingly,  
5 extrinsic evidence may be used to determine the parties' intent and includes: "(1) the subject  
6 matter and objective of the contract, (2) all the circumstances surrounding the making of the  
7 contract, (3) the subsequent acts and conduct of the parties, and (4) the reasonableness of  
8 respective interpretations urged by the parties." *Hearst* at 502. "Surrounding circumstances and  
9 other extrinsic evidence are to be used to determine the meaning of specific words and terms  
10 used and not to show an intention independent of the instrument or to vary, contradict or modify  
11 the written word." *Hearst* at 503.

12 GMAC's motion for summary judgment on its breach of contract claim (Dkt. 32) should  
13 be denied. There are issues of fact as to whether Hiatt Pontiac breached the WSA in August of  
14 2008 in failing to "promptly" repay GMAC. Although GMAC argues that the term "promptly"  
15 meant that they were to be paid within three days of a vehicle being sold, there is evidence in the  
16 record, if believed by a trier of fact, that the Hiatt Pontiac reimbursed GMAC for cars it sold  
17 over a varying range of time. Dkt. 29-14, at 4-12; Dkt. 29-15, at 4-6; Dkt. 39, at 2. There is  
18 evidence that prior audits showed that Hiatt Pontiac had sold vehicles for which it had not repaid  
19 GMAC, and that GMAC would provide them a detailed accounting, and the parties would  
20 "conduct follow-up negotiations." Dkt. 39, at 2. There is evidence that GMAC would give the  
21 dealership time to regain possession of vehicles for which the customer had not paid. Dkt. 29-  
22 15, at 4-6; Dkt. 39, at 2. Moreover, to the extent that GMAC seeks summary judgment on its  
23 breach of contract claim for the difference between what GMAC sold the new and used vehicles  
24 for and what Hiatt Pontiac owes GMAC, the motion should be denied. There are issues of fact  
25 as to whether GMAC created the situation which forced Hiatt Pontiac to be unable to pay them.  
26 *See Reynolds Metals Co. v. Electric Smith Const. & Equip.*, 4 Wn. App. 695, 699 (1971) (a party  
27 may not recover for breach of contract for delay in performance where that party is the  
28

1 proximate cause of the delay). Viewed from the Defendants' perspective, the evidence is that  
2 GMAC conducted the audit, failed to allow the dealership to respond in the customary manner,  
3 and then quickly seized a majority of the vehicles, preventing the dealership from having any  
4 hope of meeting its' obligations under the WSA. GMAC's contention that Defendants raise the  
5 same evidence as a part of their counterclaim for breach of the covenant of good faith and fair  
6 dealing does not alter the fact that there are issues of fact as to whether GMAC created the  
7 situation causing Hiatt Pontiac's inability to pay them. Accordingly, GMAC's motion for  
8 summary judgment on its claim for breach of contract (Dkt. 32) should be denied.

9 2. GMAC's Breach of Fiduciary Duty Claim Against Stephen A. Hiatt

10 GMAC alleges that its' fourth claim for breach of fiduciary duty against Stephen A. Hiatt  
11 is based on his decision to pay himself and others corporate assets after Hiatt Pontiac became  
12 insolvent to the detriment of the corporation's lawful creditors. Dkt. 32, at 19. GMAC moves  
13 for summary judgment on its breach of fiduciary duty claim against Stephen A. Hiatt (Dkt. 32),  
14 and the Defendants file a cross motion to dismiss this claim (Dkts. 24 and 38).

15 In order to establish liability for breach of fiduciary duty, the GMAC bears the burden of  
16 showing that Stephen A. Hiatt breached his fiduciary duty to GMAC and that the breach was a  
17 proximate cause of the losses sustained. *Senn v. Northwest Underwriters, Inc.*, 74 Wash. App.  
18 408, 414 (Wash. Ct. App. 1994). Stephen A. Hiatt contends that he did not have a fiduciary duty  
19 to GMAC, but to Hiatt Pontiac. Dkt. 38, at 15. GMAC argues that under the "trust fund"  
20 doctrine, Stephen A. Hiatt, as a corporate officer, owed a fiduciary duty to Hiatt Pontiac's  
21 creditors once Hiatt Pontiac became insolvent. Dkt. 32, at 19.

22 "Prior to 1931, this state followed the 'trust fund' doctrine which holds that upon  
23 insolvency the corporate assets become a trust fund and corporate officers and directors owe the  
24 creditors a fiduciary duty to preserve and equitably distribute these assets." *Block v. Olympic*  
25 *Health Spa, Inc.*, 24 Wash. App. 938, 948 (Wash. App. 1979). Under the trust fund doctrine  
26 such preferential transfers were void or voidable. *Id.* In 1931, the Washington Legislature  
27 codified the doctrine, but limited its' application, and then in 1941 further amended the "trust  
28

1 fund” doctrine under RCW 23.72.030. *Id.* In 2004, the law was repealed, and the act was not  
2 replaced. RCW 23.72.030, repealed, laws 2004, ch. 165, § 47.

3 Even assuming that the common law “trust fund doctrine” has been revived after the  
4 legislature repealed the statute, GMAC’s motion for summary judgment on its claim for breach  
5 of fiduciary duty should be denied. First, there are issues of fact as to whether Hiatt Pontiac was  
6 insolvent when the transfers to Stephen A. Hiatt were made, particularly those in early August.  
7 Moreover, Washington courts have permitted preferential payments to corporate officers during  
8 insolvency provided the transfer could withstand close scrutiny and is shown to have been both  
9 fair and equitable and not such as to constitute a fraud on creditors. *Tacoma Ass’n of Credit Men*  
10 *v. Lester*, 72 Wash.2d 453 (1967); *Block v. Olympic Health Spa, Inc.*, 24 Wash. App. 938, 949  
11 (Wash. App. 1979). There are issues of fact as to whether the transfers to Stephen A. Hiatt  
12 “could withstand close scrutiny” were “fair and equitable” and did not “constitute a fraud on  
13 creditors.”

14 Both GMAC’s motion for summary judgment on its breach of fiduciary duty claim  
15 against Stephen A. Hiatt (Dkt. 32) and the Defendant’s cross motion for summary dismissal of  
16 this claim (Dkts. 24 and 38) should be denied.

17 3. GMAC’s Claim for Fraudulent Transfer

18 GMAC moves for summary judgment on its fraudulent transfer claim, arguing that the  
19 claim is based on Stephen A. Hiatt’s deliberate diversion of corporate assets intended to hinder  
20 GMAC from collecting on Hiatt Pontiac’s debt. Dkt. 32, at 23.

21 Washington’s Uniform Fraudulent Transfer Act provides that a transfer may be  
22 fraudulent if: 1) it is made “[w]ith actual intent to hinder, delay, or defraud any creditor of the  
23 debtor,” or 2) it is made “[w]ithout receiving a reasonable equivalent value in exchange for the  
24 transfer.” RCW 19.40.041(a)(1)-(2). In determining actual intent under subsection (a)(1),  
25 consideration may be given, among other factors, to whether:

- 26 (1) The transfer or obligation was to an insider; (2) The debtor retained  
27 possession or control of the property transferred after the transfer; (3) The transfer  
28 or obligation was disclosed or concealed; (4) Before the transfer was made or  
obligation was incurred, the debtor had been sued or threatened with suit; (5) The

1 transfer was of substantially all the debtor's assets; (6) The debtor absconded; (7)  
2 The debtor removed or concealed assets; (8) The value of the consideration  
3 received by the debtor was reasonably equivalent to the value of the asset  
4 transferred or the amount of the obligation incurred; (9) The debtor was insolvent  
5 or became insolvent shortly after the transfer was made or the obligation was  
6 incurred; (10) The transfer occurred shortly before or shortly after a substantial  
7 debt was incurred; and (11) The debtor transferred the essential assets of the  
8 business to a lienor who transferred the assets to an insider of the debtor.

9 RCW 19.40.041(b).

10 GMAC's motion for summary judgment on its fraudulent transfer claim (Dkt. 32) should  
11 be denied. There are issues of fact as to whether the transfers Stephen A. Hiatt approved in  
12 August of 2008 were made with the "actual intent to hinder, delay, or defraud" GMAC. First,  
13 not all transfers were to insiders. Mr. Hiatt approved payments for payroll, utility bills, credit  
14 cards and gasoline. Dkt. 26-6, at 13-14; Dkt. 51, at 42. As above, there are issues of fact as to  
15 whether the dealership was insolvent. Even assuming that Hiatt Pontiac was insolvent, a debtor  
16 may prefer one or more creditors over others. *Public utility District No. 1 of Lewis County v.*  
17 *Washington Public Power Supply System*, 104 Wn.2d 353, 379 (1985). Under RCW  
18 19.40.081(f) a transfer to an insider is not voidable where 1) the insider gave new value, 2) if  
19 made in the ordinary course of business, or 3) was made in a good faith effort to rehabilitate the  
20 debtor. Defendants point to the fact that the salary payments to Stephen A. Hiatt and Stephen M.  
21 Hiatt were for salary already earned and three months of salary in advance to wind down the  
22 business. Dkt. 26-6, at 13-14; Dkt. 51, at 42. Defendants argue that the transfers to payoff loans  
23 were made in good faith in an effort to rehabilitate the business. Dkt. 38. Mr. Hiatt states that  
24 "looking toward the likely sale of the business, [he] authorized Hiatt Pontiac to repay the balance  
25 of the June 2005 promissory note to [his wife and him] on August 15, 2008, so that the  
26 underlying deed of trust on [their] real property would be released to permit [them] to  
27 recapitalize Hiatt Pontiac." Dkt. 39. He states that he was attempting to acquire other financing  
28 for the dealership. *Id.* There is no evidence that Hiatt Pontiac or Mr. Hiatt attempted to conceal  
the payments. Viewing the evidence in a light most favorable to the Defendants, GMAC's  
motion for summary judgment on its claim for fraudulent transfer (Dkt. 32) should be denied.

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1                   4.     Hiatt Pontiac's WCPA Claim Against GMAC

2                   As discussed in Section II. B., "Defendants Motion Pursuant to Fed. R. Civ. P. 56 (f) and  
3 Motion to Compel, GMAC's motion to summarily dismiss Hiatt Pontiac's WCPA claim should  
4 be denied without prejudice.

5                   5.     Hiatt Pontiac's Breach of Contract and Breach of the Covenant of Good  
6 Faith and Fair Dealing Claims Against GMAC

7                   GMAC moves for summary dismissal of Hiatt Pontiac's breach of contract and breach of  
8 the duty of good faith and fair dealing claims. Dkt. 32. Hiatt Pontiac argues that under the  
9 September 2008 Collateral Disposition Agreement, GMAC expressly promised that it would not  
10 return vehicles under Hiatt Pontiac's contract with GM. Dkt. 38. The September 2008  
11 Collateral Disposition Agreement provided, in relevant part,

12                   Without limitation, either of the following constitutes a commercially reasonable  
13 disposition of the Collateral: If available, the sale or return of motor vehicles to  
14 the manufacturer thereof under a repurchase or similar type of agreement, even if  
15 it results in a deficiency, provided however no motor vehicles shall be returned  
16 under the Hiatt dealer contract with GM.

17                   Dkt. 46-12, at 2. Hiatt Pontiac states that it received "charge backs" in its open account with  
18 GM. Dkt. 39, at 5. Hiatt Pontiac argues that these charges show that GMAC had, in fact,  
19 returned the vehicles to GM under the Hiatt dealer contract. *Id.*, at 5-6. There are issues of fact  
20 as to whether GMAC breached the agreement not to return vehicles under the Hiatt Pontiac's  
21 dealer contract with GM and whether it violated the covenants of good faith and fair dealing.  
22 GMAC's motion to summarily dismiss Hiatt Pontiac's claims for breach of contract and breach  
23 of the duty of good faith and fair dealing (Dkt. 32) should be denied.

24                   **E.     INDIVIDUAL DEFENDANTS' MOTION FOR SUMMARY  
25 JUDGMENT**

26                   The Hiatt Individual Defendants move for dismissal of GMAC's claims pursuant to Fed.  
27 R. Civ. P. 56, arguing: 1) to the extent that GMAC intends to hold the Stephen A. Hiatt  
28 personally liable, the corporate form should be respected because GMAC has no evidence of  
exceptional circumstances that would justify piercing the corporate veil, 2) there is no evidence  
to support GMAC's breach of fiduciary duty claim, 3) Stephen A. Hiatt's actions with respect to

1 Hiatt Pontiac's contracts with GMAC were all in his capacity as President of Hiatt Pontiac and  
2 were privileged and so there is no evidence of tortious interference with a business expectancy,  
3 4) the evidence does not support any fraudulent transfers to the Hiatt individuals, and 5) Stephen  
4 A. Hiatt alone made decisions as to payment and there is no evidence of any conspiracy among  
5 the defendants. Dkt. 24.

6 1. Piercing the Corporate Veil

7 "A corporation exists as an organization distinct from the personality of its shareholders."  
8 *Grayson v. Nordic Const. Co., Inc.*, 92 Wash.2d 548, 552 (1979). "Disregarding the corporate  
9 form or 'piercing the corporate veil,' is an equitable remedy imposed only in exceptional  
10 circumstances." *Eagle Pacific Ins. Co. v. Christensen Motor Yacht Corp.*, 85 Wash.App. 695,  
11 708 (Wash. App. 1997). Washington recognizes two theories to justify piercing the corporate  
12 veil. The first is that "[t]he corporate entity is disregarded and liability assessed against  
13 shareholders in the corporation when the corporation has been intentionally used to violate or  
14 evade a duty owed to another." *Meisel v. M & N Modern Hydraulic Press Co.*, 97 Wash.2d 403,  
15 409 (1982). Under the second theory, the "alter ego theory," the corporate veil may be pierced  
16 where "the corporate entity has been disregarded by the principals themselves so that there is  
17 such a unity of ownership and interest that the separateness of the corporation has ceased to  
18 exist." *Grayson* at 553. Stephen A. Hiatt had been Hiatt Pontiac's sole shareholder since  
19 December 31, 2007. Dkt. 29-13, at 4. In August of 2008, Stephen A. Hiatt was the sole officer  
20 of Hiatt Pontiac. *Id.*

21 a. *Corporation Used to Violate or Evade a Duty*

22 There are two elements that must be satisfied to pierce the corporate veil under this  
23 theory: 1) "the corporate form must be intentionally used to violate or evade a duty;" 2)  
24 "disregard must be necessary and required to prevent unjustified loss to the injured party."  
25 *Meisel*, at 410 (*internal citations omitted*).

26 With regard to the first element, an abuse of the corporate form must be found, which  
27 typically involves "fraud, misrepresentation, or some form of manipulation of the corporation to  
28

1 the stockholder's benefit and creditor's detriment.” *Meisel*, at 410 (*internal citations omitted*).  
2 “With regard to the second element, wrongful corporate activities must actually harm the party  
3 seeking relief so that disregard is necessary. Intentional misconduct must be the cause of the  
4 harm that is avoided by disregard.” *Meisel*, at 410 (*internal citations omitted*).

5       Considering the record as a whole, there are issues of fact as whether an abuse of the  
6 corporate form occurred here. Mr. Hiatt’s decisions to pay himself large sums of money while  
7 Hiatt Pontiac was in financial difficulty could be considered by a trier of fact to involve “fraud,  
8 misrepresentation, or some form of manipulation of the corporation” at GMAC’s expense.  
9 Accordingly, the Individual Hiatt Defendants’ Motion to summarily dismiss GMAC’s theory of  
10 recovery based upon piercing the corporate veil should be denied. There are also issues of fact  
11 as to whether the wrongful corporate activities, if they did occur, actually harmed GMAC.

12                   b.       *Alter Ego*

13       The Individual Defendants’ Motion for Summary Judgment should be denied as to the  
14 alter ego theory as well. There are sufficient issues of fact as to whether “the corporate entity  
15 has been disregarded” by Mr. Hiatt so that there is “such a unity of ownership and interest that  
16 the separateness of the corporation has ceased to exist.” *Grayson* at 553. Admittedly, Hiatt  
17 Pontiac did maintain some corporate formalities, including having a board of directors, (although  
18 it is unclear, from the record, who was on the board in August of 2008) and maintaining its own  
19 bank accounts, and records. There is evidence in the record that although the corporate cards  
20 were occasionally used for private purchases, those purchases were charged to the 220 accounts.  
21 The fact that Stephen A. Hiatt was the only stock holder is also not determinative. “[A]  
22 corporation's separate legal identity is not lost merely because all of its stock is held by members  
23 of a single family or by one person,” *Grayson* at 553. However, in August of 2008, Stephen A.  
24 Hiatt was the only officer of the company and made final decisions regarding finances. Dkt. 29-  
25 13, at 5. The evidence in the record, particularly as to the transfers of money to himself in  
26 August 2008, could be construed to indicate that the separateness of Hiatt Pontiac and Stephen  
27 A. Hiatt ceased to exist.



1                   2.       GMAC's Claim for Breach Fiduciary Duty Against Stephen A. Hiatt

2           The Hiatt Individual Defendants move for the summary dismissal of GMAC's claim for  
3 Breach of Fiduciary Duty. Dkt. 24. As stated in the Discussion section on GMAC's motion for  
4 summary judgment on its claim for breach of fiduciary duty (Section II. D. 2.), the Hiatt  
5 Individual Defendants' motion to summarily dismiss this claim should be denied.

6                   3.       GMAC's Claim for Tortious Interference with Contractual Relationship

7           The Hiatt Individual Defendants move for summary dismissal of GMAC's tortious  
8 interference with a contractual relationship claim. Dkt. 24. GMAC states that its claim is based  
9 on the fact that Hiatt diverted funds to himself and his family members and removed vehicles  
10 from the dealership lot, in order to impair GMAC's right to collect on Hiatt Pontiac's debt. Dkt.  
11 42, at 17. In support of its claim regarding the moved vehicles, GMAC points to language in the  
12 WSA which provides:

13           GMAC is hereby granted a security interest in the vehicles and the proceeds of  
14 sale thereof ("Collateral") as more fully described herein. The collateral subject  
15 to this [WSA] is new vehicles held for sale or lease and used vehicles acquired  
16 from manufacturers or distributors and held for sale or lease, and all vehicles of  
17 like kinds or types now owned or hereafter acquired from manufacturers,  
distributors, or sellers by way of replacement, substitution, addition or otherwise,  
and all additions and accessions thereto and all proceeds of such vehicles,  
including insurance proceeds.

18           Dkt. 29-2, at 2.

19           "An action for tortious interference with a contractual relationship lies only against a  
20 third party. A party to the contract cannot be liable in tort for inducing its own breach."  
21 *Olympic Fish Products, Inc. v. Lloyd*, 93 Wash.2d 596, 598 (1980). "An officer or director of a  
22 corporation is not personally liable for inducing the corporation to violate a contractual relation  
23 provided the officer or director acts in good faith. Good faith in this context means nothing more  
24 than an intent to benefit the corporation." *Id.*, at 599.

25           To the extent that the claim is based upon the diversion of funds, the Hiatt Individual  
26 Defendants' motion should be denied. There are issues of fact as to whether Stephen A. Hiatt  
27 acted in good faith in regard to the payments he made out of the Hiatt Pontiac accounts the end  
28 of August 2008.



1 To the extent that the claim is based upon the Hiatts' removal of vehicles which GMAC  
2 did not finance, the motion should be denied as to Stephen A. Hiatt and granted to as to the  
3 remaining Defendants. Although the Hiatts argue that parties' course of dealing demonstrates  
4 that GMAC did not have an interest in the nonfloored vehicles, there are issues of fact as to  
5 whether Stephen A. Hiatt acted in good faith when he ordered the vehicles moved. As to  
6 Stephen M. Hiatt, GMAC makes no showing that employees can be held liable when acting at  
7 the direction of their employer within the scope of their duties. Accordingly, to the extent that  
8 GMAC brings a claim against Stephen M. Hiatt, who was not officer or director, or any of the  
9 other individual defendants for tortious interference with a contractual relationship, the claim  
10 should be dismissed.

11 4. GMAC's Fraudulent Transfer Claim

12 As stated in section II. D. 3. above, there are issues of fact as to GMAC's fraudulent  
13 transfer claim. The Hiatt Individual Defendants' motion to dismiss this claim (Dkt. 24) should  
14 be denied as to Stephen A. Hiatt. Defendants concede that there may be factual issues that  
15 preclude summary judgment on these issues as to Stephen A. Hiatt. Dkt. 50, at 13.

16 The motion should be granted as to Stephen M. Hiatt, Thea Hiatt and Carol Hiatt.  
17 GMAC has failed to carry its burden to show that there are issues of fact on the claim for  
18 fraudulent transfer as to these three defendants. GMAC's claim for fraudulent transfer against  
19 Stephen M. Hiatt, Thea Hiatt and Carol Hiatt should be dismissed.

20 5. GMAC's Conspiracy Claim

21 In the state of Washington a civil conspiracy is defined as "a combination of two or more  
22 persons who contrive to commit a criminal or unlawful act, or to commit a lawful act for  
23 criminal or unlawful purposes." *Adams v. King County*, 164 Wash.2d 640, 660 (2008). "In  
24 order to establish a conspiracy the plaintiff must show that the alleged coconspirators entered  
25 into an agreement to accomplish the object of the conspiracy." *Corbit v. J. I. Case Co.*, 70  
26 Wash.2d 522, 529 (1967). A conspiracy must be proved by clear, cogent, and convincing  
27 evidence. *Id.*

1 The Hiatt Individual Defendants' motion to summarily dismiss GMAC's conspiracy  
2 claim (Dkt. 24) should be granted. GMAC has failed to point to clear, cogent, and convincing  
3 evidence that the parties entered into an "agreement to accomplish the object" of a conspiracy.  
4 GMAC points to the fact that Stephen A. Hiatt ordered Stephen M. Hiatt to move some of the  
5 vehicles GMAC did not finance and that Stephen M. Hiatt, an employee, admits moving those  
6 vehicles after GMAC demanded all vehicles be turned over. GMAC argues that this evidence  
7 shows that they had an "agreement." Dkt. 42. Contrary to GMAC's urging, this evidence is not  
8 sufficient to overcome the high standard required. GMAC's conspiracy claim should be  
9 dismissed.

### 10 **III. ORDER**

11 Therefore, it is hereby, **ORDERED** that:

- 12 • Defendants' Motion to Strike (Dkt. 38) is **GRANTED, IN PART, AND DENIED, IN**  
13 **PART**, as stated above;
- 14 • GMAC's motion to strike the Declaration of Stephanie Bloomfield (Dkt. 44) is  
15 **DENIED**;
- 16 • GMAC's motion to strike Stephen A. Hiatt's Declaration (Dkt. 43) is **GRANTED** in  
17 part, as stated above, and **DENIED** in all other respects;
- 18 • GMAC's motion to strike Stephen A. Hiatt's Supplemental Declaration (Dkt. 52) is  
19 **GRANTED** in part, as stated above, and **DENIED** in all other respects;
- 20 • Defendants' Motion Pursuant to Fed. R. Civ. P. 56(f) (Dkts. 33 and 35) is **GRANTED** as  
21 to the Defendants' Washington Consumer Protection Act claim and **DENIED** as to the  
22 remaining issues raised in GMAC's Motion for Partial Summary Judgment;
- 23 • Defendants' Motion to Compel (Dkt. 33 & 35) is **GRANTED**, to the extent that GMAC  
24 has not answered Interrogatory No. 24 and Request for Production No. 28; they are now  
25 **ORDERED TO DO SO**;
- 26 • GMAC's Motion for Partial Summary Judgment (Dkt. 32) is:
  - 27 • **DENIED** as to GMAC's claims for breach of contract, breach of fiduciary duty;

and fraudulent transfer;

- **DENIED WITHOUT PREJUDICE** as to Defendants' claim under the Washington Consumer Protection Act;

- **DENIED** as to Defendants' claims for breach of contract and breach of the duty of good faith and fair dealing;

- Defendants' cross summary judgment motion for dismissal of GMAC's claim for breach of fiduciary duty (made in both Dkts. 24 and 38) is **DENIED**;

- Hiatt Individual Defendants' Motion for Summary Judgment (Dkt. 24) is:

- **DENIED** as to their motion to dismiss GMAC's theory of recovery based upon piercing the corporate veil;

- **DENIED** as to their motion to dismiss GMAC's tortious interference with a contractual relationship as against Stephen A. Hiatt, and **GRANTED** to the extent that the claim is made against Stephen M. Hiatt;

- GMAC's claim against Stephen M. Hiatt of tortious interference with a contractual relationship is **DISMISSED**;

- **DENIED** as to their motion to dismiss GMAC's fraudulent transfer claim against Stephen A. Hiatt, but is **GRANTED** to the extent that the claim is asserted against Stephen M. Hiatt, Thea Hiatt, and Carol Hiatt;

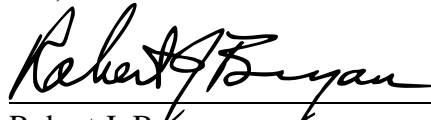
- GMAC's claim for fraudulent transfer, asserted against Stephen M. Hiatt, Thea Hiatt, and Carol Hiatt is **DISMISSED**;

- **GRANTED** as to their motion to summarily dismiss GMAC's conspiracy claim

- GMAC's conspiracy claim is **DISMISSED**.

The Clerk of the Court is instructed to send uncertified copies of this Order to all counsel of record and to any party appearing *pro se* at said party's last known address.

DATED this 7<sup>th</sup> day of December, 2009.



Robert J. Bryan  
United States District Judge